United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

280

No. 24949

(Criminal No. 1785-68)

ARTHUR S. MEDLEY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal From A Judgment
Of The
United States District Court
For the District of Columbia

BRIEF FOR APPELLANT

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Due Date: February 22, 1971

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I.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court committed error in denying appellant's motion to dismiss on the grounds that appellant has been denied a speedy trial in violation of the provisions of Amendment VI of the Constitution of The United States (U.S. Const., Amend. VI).

2. Whether the District Court committed error in denying appellant's motion to dismiss on the grounds that applicant has been denied effective assistance of counsel in violation of the provisions of Amendment VI of the Constitution of The United States (U.S. Const. Amend. VI).

3. Whether the District Court committed error in denying appellant's motion for judgment of acquittal on the grounds that the prosecution had submitted insufficient evidence to prove all of the elements of the offense charged.

This case has not been before this court previously under the same or similar title.

II.

REFERENCES TO RULINGS

1. The District Court denied appellant's motion to dismiss for lack of a speedy trial and denial of effective assistance of counsel on June 23, 1970 (Tr. 60).

2. The District Court denied appellant's motion for judgment of acquittal which was first made at the close of the Government's case and renewed at the close of defendant's case (Tr. 140, 174).

III.

STATEMENT OF THE CASE

Appellant Arthur S. Medley was arrested on September 21, 1968, pursuant to an arrest warrant issued on September 19, 1968, on the basis of an affidavit executed on the same date by Detective Francis E. Baker, Jr., of the Metropolitan Police Department. The affidavit charged appellant with assaulting Edith L. Curry with intent to have carnal knowledge of her on the basis of interviews with the mother of the alleged victim and two alleged witnesses (Affidavit in Support of Arrest Warrant).

Presentment was held in the Court of General Sessions (No. 34926-68A) and bond was set at $5,000. Preliminary hearing was held on October 2, 1968, and the case was bound over to the Grand Jury with bond lowered to $3,000. Medley was represented at the preliminary hearing by counsel who had no further contact with him thereafter (Tr. 39-40).

On October 16, 1968, appellant was released to the custody of Bonabond on the condition that he maintain daily contact with Bonabond and attend weekly meetings at Bonabond (Defense Exhibit No. 1, Tr. 25-26).

On November 6, 1968, an indictment was filed by the Grand Jury charging that:

> "On or about September 17, 1968, within the District of Columbia, Arthur S. Medley assaulted Edith L. Curry with intent to have carnal knowledge of the said Edith L. Curry, forcibly and against her will."

Appellant was arraigned on the foregoing charge before Chief Judge Curran on November 22, 1968, without benefit of counsel, and entered a plea of not guilty. Appellant was referred by the court for appointment of counsel and permitted to remain on bond (Plea of Defendant, November 22, 1968). He was advised at this time that counsel would be appointed for him (Tr. 51-52).

During the period from October 16, 1968, to October 1, 1969, appellant Medley reported daily by telephone or in person to Bonabond and attended weekly meetings at Bonabond with the exception of a brief period in February 1969 when he was confined in connection with another charge. During this entire period Medley could have been produced upon notification from the District Court but never received any such notice (Tr. 25-27, 29-30, 44-45). During this period Medley also maintained regular contact by telephone or in person with the District of Columbia Bail Agency (Tr. 45) although the Bail Agency records do not indicate any requirement for him to do so (Tr. 8).

At the time of his arrest in October 1968, Medley lived at 3515 21st Street, S.E., and continued to live there until December 1968 when he moved to 3230 Highwood Drive, S.E. (Tr. 46). Medley testified that he notified both Bonabond and the Bail Agency of that change of address in December 1968 (Tr. 46). Bonabond knew of the change of address in December 1968 as evidenced by the fact that its representative made a visit to Medley at his new address in December 1968 or January 1969 (Tr. 27, 37). The records of the Bail Agency in this case showed that the change of address had been recorded in the file relating to this case but indicated that it was not recorded until sometime after July 1969 (Tr. 12). The Bail Agency Director testified that although his file in this case did not show Medley's change of address until after July 1969, that information could have been received earlier and put in another file but not have been put in this file (Tr. 13).

After his arraignment on November 27, 1968, appellant received no notice from the court, from the Bail Agency, or from Bonabond of any required court appearances until he was arrested in October 1969 pursuant to a bench warrant issued by Judge Curran on May 19, 1969, when he failed to appear for ascertainment

of counsel hearing (Tr. 46-47). Although the Bail Agency had notice of that hearing, its only effort to notify him was by mailing notice to an address from which it already knew Medley had moved without leaving a forwarding address (Tr. 9-11). Bonabond, into whose custody he had been released was given no notice of this hearing (Tr. 29).

At the time of his arrest in October 1969, appellant had just begun serving sentence on a misdemeanor charge. Defendant remained in custody until his trial on August 11 and 12, 1970, and thereafter until the present time.

Aside from the fact that counsel was appointed to appear with him at his preliminary hearing, Medley was without benefit of counsel from his arrest in September 1968 until mid-November 1969 (Tr. 39-40, 56).

The testimony on which appellant was convicted of assault with intent to commit carnal knowledge is as follows:

Barty Daniel New, an insurance inspector, was conducting an inspection of the basement of a building located at 1100 Mississippi Avenue, S.E., on September 17, 1968, when he heard ". . . a moaning sound or a crying sound, whimpering sound, and at first I thought it was the kids playing outside." (Tr. 90-92). Upon entering

a dark storage room and flashing his flashlight he ". . . saw a man's feet and I heard someone say, 'Come on, baby. Come on, baby.'" (Tr. 92). The man's feet were positioned so that "The toes were pointing down" (Tr. 93). He then left the building and came across Mr. Jackson, the janitor, with whom he returned to the basement to investigate further (Tr. 92-93). Upon their return to the basement Mr. New was standing behind Mr. Jackson when he heard Mr. Jackson say "Get up Arthur" and then saw Medley come out of the storage room zipping up his pants. Medley had blood on his shirt and pants (Tr. 93-94). The girl's lower lip was swollen and bloody and her crotch area was wet (Tr. 94).

Nathaniel Jackson, a janitor employed at the apartment building where the alleged crime was committed at the time it is alleged to have been committed also testified for the prosecution (Tr. 100-101). Mr. Jackson was working outside the building on September 17, 1968, when Mr. New came out and asked him to return to the basement with him to investigate the sounds he had heard (Tr. 101-102). Upon entering the basement with Mr. New, Mr. Jackson heard a girl crying and began striking matches to see what was taking place. He saw Medley lying ". . . sort of on top of. . ." the alleged victim, Edith Curry

who ". . . was fighting him off all the time" (Tr. 102-103). Mr. Jackson told Medley to get up and get out of the building whereupon Medley got up and zipped his pants and left (Tr. 103). When Jackson first saw Miss Curry her pants were ". . . down about her knees like" and she was pulling them up. She was bleeding from the mouth and her lips were swollen. Medley had blood on his shirt (Tr. 103).

Detective Francis Eugene Baker, Jr., of the Sex Squad of the Metropolitan Police Department testified that on the afternoon of September 17, 1968, he received information of an alleged sex offense and proceeded to D.C. General Hospital where he met Miss Curry and her mother outside the hospital and took some photographs which were introduced as Exhibits 3, 4 and 5 (Tr. 119-121). He testified that at the time that he saw Miss Curry her lower lip was lacerated and swollen (Tr. 120). Those were the only injuries that he noted. He also noticed that her clothes appeared to be dirty (Tr. 121-122).

Miss Curry's mother, Mrs. Charity Curry testified that she and her two daughters lived in the building in which the alleged offense occurred in September 1968 (Tr. 126). She further testified that although her older daughter, Edith, is twenty-nine years old "She is a retarded

child and she has the mind of a child, around about seven years old probably" (Tr. 126-127). On the afternoon of the alleged offense she saw Edith eating ice cream in front of their apartment and ten or fifteen minutes later she came into the house ". . . with her mouth bleeding and all swollen and twisted" (Tr. 128). Her pants were dirty (Tr. 131) but she had no other injuries (Tr. 131-132). Mrs. Curry took Edith down to the street and asked that she explain what happened to her and Edith pointed to Medley (Tr. 133).

At the close of the prosecution case the Government and defendant entered into the following stipulation (Tr. 141-142):

> "That on September 17, 1968, that the complaining witness, Miss Edith Curry, was examined at D.C. General Hospital by a Doctor Jack Olson and if Doctor Olson was called to the stand he would give the following facts about the examination:
>
> Number one, he was unable to determine whether there was any forced vaginal intercourse on the complainant, Miss Edith Curry.
>
> Number two, that there was no evidence of any semen in the vaginal area of the complainant, Miss Edith Curry.
>
> Number three, the only bruises or lacerations on the body of the person of Miss Edith Curry was a blood trauma to the lower lip, a fat lip.

> Number four, that Miss Edith Curry is retarded. That is a fact that you may assume for the purposes of your deliberations in this case."

Medley took the stand in his own defense and testified that on September 17, 1968, he had gone to the basement of the apartment building at 1100 Mississippi Avenue, S.E., to find his supervisor for the purpose of determining his employment status (Tr. 144-146). He testified further that when he entered the basement of the building he saw Miss Curry laying at the bottom of the steps and attempted to help her up and shortly thereafter Mr. Jackson came on the scene (Tr. 147). On cross-examination he denied that he had gotten on top of Miss Curry (Tr. 160), that he was zipping his fly when he encountered Mr. Jackson (Tr. 160-161), that Miss Curry's pants were down (Tr. 161), or that he made any attempt to have sexual intercourse with her (Tr. 166).

IV.

ARGUMENT

1. Appellant Was Denied A Speedy Trial In Violation Of The Sixth Amendment

Amendment VI of the Constitution of the United States provides in pertinent part that: "In all criminal prosecutions, the accused shall have the right to a speedy and public trial. . ."

The factors to be considered in determining whether this right has been denied are as follows:

(1) the length of the period between arrest and trial;

(2) the reasons for the delay;

(3) the diligence of prosecutor, court, and defense counsel; and

(4) the reasonable possibility of prejudice from the delay.[1/]

With respect to the first factor, namely the length of time involved, this Court has observed that:

> There is no touchstone of time which sets a fixed maximum period that automatically requires application of the Sixth Amendment and dismissal of the indictment. Time is but one factor, albeit the most important; the longer the time between arrest and trial, the heavier the burden of the Government in arguing that the right to a speedy trial has not been abridged. 2/

1/ Harling v. United States, 130 U.S. App. D.C. 392, 401 F.2d 392 (1968); Dockery v. United States, 129 U.S. App. D.C. 243, 393 F.2d 352 (1968); Hedgepeth v. United States, 125 U.S. App. D.C. 19, 365 F.2d 952 (1966); Hedgepeth v. United States, 124 U.S. App. D.C. 291, 364 F.2d 684 (1966).

2/ Hedgepeth v. United States, 124 U.S. App. D.C. 291, 364 F.2d 684 (1966).

While refraining from establishment of an absolute rule as to the elapsed time from arrest to trial which would be sufficient to constitute a violation of the Sixth Amendment, the court has recognized ". . . that periods of delay from arrest to trial which exceed a year raise a claim with 'prima facie merit'".[3/] Here the period of delay from arrest on September 21, 1968, to trial on August 11, 1970, exceeds the standard of "prima facie merit" by a substantial margin.

With respect to the second factor to be considered, namely the reasons for the delay, the record establishes that none of the delay can be fairly attributed to appellant. On October 16, 1968, twenty-five days after his arrest, defendant was released to the custody of Bonabond. From that date until October 1969, when Medley began to serve a sentence imposed in connection with a misdemeanor charge, he maintained continuing contact with Bonabond and with the District of Columbia Bail Agency but during that entire period he never received notice of any kind to appear in connection with the charges against him

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3/ Harling v. United States, 130 U.S. App. D.C. 392, 401 F.2d 392 (1968).

in this case (Tr. 45-47). Furthermore, aside from the fact that he was accompanied at his preliminary hearing by a lawyer who had no further contact with him thereafter, he was not otherwise represented by counsel and therefore had no effective means of taking any action to expedite his case until mid-November of 1969 when counsel was finally appointed for him. As Medley testified at the hearing on his motion to dismiss, he relied on the assurance given him at his arraignment that counsel would be appointed for him and thought he would be advised at such time as any action was to be taken in this case (Tr. 51-54). In view of Medley's past experiences with the judicial machinery in the District of Columbia (Tr. 52-54) his behavior was quite reasonable and certainly involved no affirmative effort to avoid prompt disposition of the charges against him. In United States v. Reed, 285 F.Supp. 738 (1968) Judge Younghdahl, relying on Pitts v. North Carolina, 395 F.2d 182 (4th Cir. 1968), found that delays cannot properly be attributed to a defendant ". . . where he is powerless to assert his right because of imprisonment, ignorance, and lack of legal advice." The latter two circumstances were clearly present here during the period from appellant's arrest in September of 1968 until mid-November 1969 when he was finally provided with counsel.

Between mid-November 1969 and August 1970 when appellant was finally tried at least some of the elapsed time is fairly attributable to the defense since it resulted from requests of defense counsel for pre-trial psychiatric examination of appellant and appellant's motion to dismiss. However, there is no indication of deliberate delay on behalf of appellant or of any delay in excess of that which is reasonably necessary to proper and complete trial preparation and prosecution of a pre-trial motion which defendant had a sound basis for filing. In any case, this Court has held that elapsed time attributable to defendant should not be disregarded in determining whether there has been denial of a speedy trial. For example, in Hedgepeth v. United States, 124 U.S. App. D.C. 291, 364 F.2d 684 (1966), this court stated that:

> Although we agree with the Government that the delay up to March 15, 1965, is fairly attributable to appellant and does not, in itself, constitute denial of a speedy trial, this does not mean that this period is to be disregarded. The passing of such a considerable length of time, no matter who is "at fault," should act as a spur to the Government to seek prompt trial. If the Government is lax in this regard, it is appropriate to take the earlier period into account in determining whether there has been a denial of the right to a speedy trial.

Again in Hedgepeth v. United States, 125 U.S. App. D.C. 19, 365 F.2d 952 (1966) this Court observed that:

> . . . the fact that this delay is attributable to appellant does not mean that it is to be disregarded in considering whether a speedy trial was denied if there is an additional delay for which appellant is not responsible.

Applying the foregoing principle, the entire period of twenty-three months from arrest in September 1968 to trial in August 1970 is properly assessable against the Government in determining the extent to which appellant has been denied his right to a speedy trial.

The third factor to be considered is the diligence exercised by the prosecutor, the court, and defense counsel. In determining who should bear the responsibility for excessive delays in criminal prosecutions this court has recognized that:

> It must be borne in mind that the prosecution, not the defense, is charged with bringing a case to trial. The Government may not 'sit back' and then argue that defendant's inaction conclusively waived his right to a speedy trial. 4/

4/ Hedgepeth v. United States, 124 U.S. App. D.C. 291, 364 F.2d 684 (1966).

More recently in Bynum v. United States, 133 U.S. App. D.C. 4, 408 F.2d 1207 (1969), cert. denied, 394 U.S. 935, 89 S.Ct. 1211, the Court reiterated that, because ". . . the District Court's rules in effect gave the prosecutor control over the calendar" the prosecution is chargeable for periods when a case is "inert". Inert is a fully appropriate word to describe the status in which this case languished for an excessive period.

Although the elapsed time between Medley's arrest on September 18, 1968, and his arraignment (without counsel) on November 22, 1968, might be attributed to ". . . delay inherent in a deliberate pace appropriate to satisfy other constitutional and procedural safeguards of criminal defendants. . ."[5/] no such justification can be provided for the period from indictment in November 1968 to appointment of counsel in November 1969. The first activity of any kind indicated in the docket subsequent to indictment is in ascertainment of counsel hearing which was held on May 16, 1970. The record indicates that because of an administrative mixup the only notice of such

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5/ Hedgepeth v. United States, 125 U.S. App. D.C. 19, 365 F.2d 952 (1966).

hearing which was served on appellant was mailed by the District of Columbia Bail Agency to an address at which the Bail Agency records clearly indicated he had not lived for some months and was never received by him (Tr. 9-11, 46-47). Bonabond, the agency into whose custody he had been released, was aware of his new address as evidenced by the fact that its representative had visited appellant at the new address months before the notice of the May 16 hearing was served (Tr. 27, 37).

As a result of Medley's failure to appear at the hearing a bench warrant was issued. A notation on the warrant indicates that it was received by the Warrant Squad of the U.S. Marshal's Office at 12:42 PM on May 19, 1969. The record does not show what efforts were made to execute the warrant during the succeeding months when appellant was maintaining daily contact with Bonabond but the warrant itself indicates that it was not "filed" until October 17, 1969, six months after its issuance, and several days after Medley had been taken into custody on a misdemeanor charge.[6/] The next indication of activity

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6/ "The police and prosecutor are not the only governmental officials whose conduct is governed by The Speedy Trial Clause; it covers that of court personnel as well, e.g., Pollard v. United States, supra [352 U.S. 354, 1 L.Ed.2d 393 (1957)]; Marshall v. United States, 337 F.2d 119 (C.A.D.C. Cir. 1964)." Concurring opinion of Justice Brennan in Dickey v. Florida,____U.S.____, 26 L.Ed.2d 26 (1970).

was on October 21, 1969, when the case was "referred to Legal Aid for assignment of counsel". It was called again on October 31, 1969, and continued to December 2, 1969, and again "referred to Legal Aid", apparently because the earlier referral had not been effected. Finally, in mid-November, trial counsel became available to appellant for the first time.

There can hardly be any serious question but that responsibility for all of the delay up to November 1969 must be attributed to the prosecution and to the District Court. Certainly there is no evidence that defendant did anything to avoid the jurisdiction or the process of the court during that period. Indeed, the evidence indicates quite clearly that Medley faithfully complied with the conditions of his release and expected, as he had every reason to, that counsel would eventually be appointed for him. The most that can be said against Medley is that he failed to take affirmative action to expedite his trial. However, the clear inequity of requiring a defendant to take affirmative action in order to preserve his right to a speedy trial has recently been emphasized in the concurring opinion of Justice Brennan in Dickey v. Florida, ____ U.S. ____, 26 L.Ed.2d 26 (1970), 39 as follows:

Second, the equation of silence or inaction with waiver is a fiction that has been categorically rejected by this Court when other fundamental rights are at stake. Over 30 years ago in Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.Ed. 1461, 1466, 58 S.Ct. 1019, 146 A.L.R. 357 (1938), we defined "waiver" as "an intentional relinquishment or abandonment of a known right or privilege." We have made clear that courts should "indulge every reasonable presumption against waiver," Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393, 81 L.Ed. 1177, 1180, 57 S.Ct. 809 (1937), and that they should "not presume acquiescence in the loss of fundamental rights." Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307, 81 L.Ed. 1093, 1103, 57 S.Ct. 724 (1937). In Klopfer, supra, at 223, 18 L.Ed.2d at 8, we held that the right to a speedy trial "is as fundamental as any of the rights secured by the Sixth Amendment." It is a safeguard of the interests of both the accused and the community as a whole. Thus, can it be that affirmative action by an accused is required to preserve - rather than to waive - the right?

Third, it is possible that the implication of waiver from silence or inaction misallocates the burden of ensuring a speedy trial. The accused has no duty to bring on his trial. He is presumed innocent until proven guilty; arguably, he should be presumed to wish to exercise his right to be tried quickly, unless he affirmatively accepts delay. The Government, on the other hand, would seem to have a responsibility to get on with the prosecution, both out of fairness to the accused and to protect the community interests in a speedy trial. Judge Weinfeld of the District Court for the Southern District of New York has observed "I do not conceive it to be the duty of a defendant to press that he be prosecuted under an indictment upon penalty of waiving his right to a speedy trial if he fails to do so. It is the duty

> of the public prosecutor, not only to prosecute those charged with crime, but also to observe the constitutional mandate guaranteeing a speedy trial. If a prosecutor fails to do so, the defendant cannot be held to have waived his constitutional right to speedy trial." United States v. Dillon, 183 F.Supp. 541 (1960) (Footnote omitted).

Where, as here, Medley was without assistance of counsel for most of the period in question, the applicability of the foregoing rationale would seem to be especially appropriate.

The final factor to be considered in evaluating defendant's claim of denial of a speedy trial, and one which is particularly evident here, is that of prejudice. At the outset, it should be noted that there is authority for the proposition that ". . . the very assumption of the Sixth Amendment is that unreasonable delays are by their nature prejudicial" and that "it is not generally necessary for the defendant to demonstrate affirmatively how he has been prejudiced by an unreasonable delay." Hedgepeth v. United States, 124 U.S. App. D.C. 291, 364 F.2d 684 (1966). See also United States v. Lustman, 253 F.2d 475 (1958) holding that ". . . a showing of prejudice is not required when a criminal defendant is asserting a right under the Sixth Amendment."

Even assuming, however, that Medley must affirmatively establish prejudice, there is compelling

evidence that he has, in fact, been prejudiced by the delay in trial. He is accused of assault with "Attempt to Commit Carnal Knowledge" upon a woman who allegedly has the mind of a child. No one actually testified to having seen Medley commit an assault or attempt to penetrate the alleged victim. Instead, two witnesses testified to their observations when they came upon the scene of the alleged crime (Tr. 90-118), and the alleged victim's mother, testified as to her physical appearance and apparent mental condition shortly after the offense was supposed to have been committed (Tr. 126-137). There was no opportunity for anyone representing Medley to question any of those people until fourteen months after the crime is said to have been perpetrated, until after they had committed themselves to these versions of what they had seen by repeating their stories over and over again to policemen, prosecutors, and grand jurors, and until after their fleeting impressions of what they claimed to have seen in only a few moments' time in a dark basement, had hardened into unshakeable certainty. There is no way to tell what critical facts or inconsistencies a competent defense attorney might have been able to obtain from these witnesses if he had only had an opportunity to interview them while the events were still fresh in their minds.

Even more important, it might have been possible to elicit some utterance from the alleged victim which might have shed favorable light upon what actually transpired between her and Medley if only there had been an opportunity to question her promptly. However, fourteen months after the event it would have been impossible to elicit anything from her because, if her mental state is as asserted by her mother (Tr. 127), and as stipulated to by trial counsel (Tr. 141-142), there would be serious question as to whether she would even have been able to recollect the incident after that much time had passed. Indeed, trial counsel stated that as soon as he was appointed to this case he attempted to interview Miss Curry but his efforts were fruitless because of her complete lack of recollection of the alleged incident (Tr. 56). Thus, whatever opportunity may have existed to uncover evidence favorable to Medley was irretrievably destroyed by the excessive delay over which he had no effective control.

The utter impossibility and unreasonableness of requiring a person in Medley's position to establish precisely what favorable evidence may have eluded him as the result of the delay was pursuasively described in the concurring opinion of Justice Brennan in Dickey v. Florida,

____ U.S. ____, 26 L.Ed.2d 26 (1970), at 41-42 as follows:

> Although prejudice seems to be an essential element of speedy trial violations, it does not follow that prejudice - or its absence, if the burden of proof is on the government - can be satisfactorily shown in most cases. Certainly, as the present case indicates, it can be established in some instances. It is obvious, for example, if the accused has been imprisoned for a lengthy period awaiting trial or if the government has delayed in clear bad faith. But concrete evidence of prejudice is often not at hand. Even if it is possible to show that witnesses and documents, once present, are now unavailable, proving their materiality is more difficult. And it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses. As was stated in Ross v. United States, 349 F.2d 210 (CA DC Cir. 1965):
> "[The defendant's] failure of memory and his inability to reconstruct what he did not remember virtually precluded his showing in what respects his defense might have been more successful if the delay had been shorter. . . . In a very real sense, the extent to which he was prejudiced by the government's delay is evidenced by the difficulty he encountered in establishing with particularity the elements of that prejudice."
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> * * * *
>
> Despite the difficulties of proving, or disproving, actual harm in most cases, it seems that inherent in prosecutorial delay is "potential substantial prejudice," United States v. Wade, 388 U.S. 218, 227, 18 L.Ed.2d 1149, 1157, 87 S.Ct. 1926 (1967), to the Speedy Trial Clause. The speedy trial safeguard is premised upon the reality that fundamental unfairness is likely in overlong prosecutions. We said in Ewell, supra, at 120, 15 L.Ed.2d at 630, that the guarantee

> of a speedy trial "is an important safeguard . . . to limit the possibilities that long delay will impair the ability of an accused to defend himself," and Judge Frankel of the District Court for the Southern District of New York has stated that "prejudice may fairly be assumed simply because everyone knows that memories fade, evidence is lost, and the burden of anxiety upon any criminal defendant increases with the passing months and years." United States v. Mann, 291 F.Supp. 268, 271 (1968).
>
> Within the context of Sixth Amendment rights, the defendant generally does not have to show that he was prejudiced by the denial of counsel, confrontation, public trial, and impartial jury, knowledge of the charges against him, trial in the district where the crime was committed, or compulsory process (footnote omitted). Because potential substantial prejudice inheres in the denial of any of these safeguards, prejudice is usually assumed when any of them is shown to have been denied. Because concrete evidence that their denial caused the defendant substantial prejudice is often unavailable, prejudice must be assumed, or constitutional rights will be denied without remedy. Prejudice is an issue, as a rule, only if the government wishes to argue harmless error. See Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065 (1967). When the Sixth Amendment right to speedy trial is at stake, it may be equally realistic and necessary to assume prejudice once the accused shows that he was denied a rapid prosecution.

In conclusion, appellant respectfully submits that every test which must be applied in making a determination as to whether the Sixth Amendment has been violated by denial of a speedy trial is fully satisfied in this case. The refusal of the trial court to grant appellant's motion for dismissal was therefore clear error.

2. Appellant Was Denied Timely Assistance Of Counsel In Violation Of The Sixth Amendment

Amendment VI of the Constitution of the United States provides in pertinent part that:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defence."

Appellant Medley was arrested on September 21, 1968. He was represented at a preliminary hearing on October 2, 1968, by an attorney who had no further contact with him (Tr. 39-40). Thereafter Medley was without assistance of counsel until November 1969 when a Legal Aid attorney was appointed to his case. Appellant raises no issue as to the competence of appointed trial counsel or the effectiveness with which he represented Medley following his appointment. Rather, it is appellant's contention that denial of counsel during the fourteen months following his arrest was a denial of assistance of counsel in violation of the Sixth Amendment and effectively precluded Medley from obtaining a fair trial on the offense charged.

The U.S. Supreme Court, in discussing the nature and scope of the Sixth Amendment right to counsel, stated in United States v. Wade, 388 U.S. 218, 18 L.Ed.2d 1149 (1967) that:

> In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings. The guarantee reads:
>
> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence" (Emphasis supplied). The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful "defence".
>
> As early as Powell v. Alabama, supra, we recognized that the period from arraignment to trial was "perhaps the most critical period of the proceedings . . .," id., at 57, 77 L.Ed. at 164, 84 A.L.R. 527, during which the accused "requires the guiding hand of counsel. . .,

Wade was concerned with the question of whether the Sixth Amendment right to counsel had been violated by requiring defendant to appear in a pre-trial line-up without counsel being present. It speaks of the need of representation by counsel at ". . . any pre-trial confrontation . . ." and discusses earlier cases concerned with the need for counsel at various types of pre-trial encounters between the accused and the prosecution, the police, or the accusers. The Court concluded in Wade that the earlier cases discussed therein embody a principle which -

> . . . requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve

> the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself.

It concludes that:

> . . . the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.

In the instant case there is no question of any improper confrontation. Appellant does not complain of any pre-trial interrogation without benefit of counsel; he does not complain of any pre-trial line up without benefit of counsel; he does not complain of any waiver of defenses without benefit of counsel. What is at issue here is the corollary of the confrontation situation. Here we are not concerned with the Government obtaining evidence, or information, or concessions from the accused but rather with its making it impossible for the accused to obtain information or evidence useful in his defense by denying him the means of obtaining it until the opportunity fades with the passage of time. While the injury and prejudice resulting from denial of counsel for this purpose may be less direct and obvious than in the

"confrontation" situations it is no less effective in precluding the accused from a fair trial.

Here Medley stands accused of attacking a mentally defective woman. Whatever hope there may have been of eliciting from her some statement favorable to his defense had long since disappeared when his lawyer had the first opportunity to interview her (Tr. 56).

Similarly, by the time he was able to contact the other prosecution witnesses their versions of the events in issue were carefully fixed in their minds after repeated recitation to the receptive ears of police and prosecutors.

If the right to counsel provision is intended, as declared by the Supreme Court in Wade, to be a guarantee that an accused person ". . . need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial" then that guarantee has surely been impinged in the instant case.

3. The Government Did Not Present Sufficient Evidence To Support A Conviction Of The Offense Charged

The elements of the offense for which appellant stands convicted are:

(1) an assault;

(2) an intent to have carnal knowledge of the female; and

(3) a purpose to carry into effect this intent with force and against the consent of the female.[7/]

a. The Evidence Did Not Establish Intent To Commit Carnal Knowledge

In Hammond v. United States, 75 U.S. App. D.C. 397, 127 F.2d 752 (1942) it was held that where the facts presented by the Government could equally support a conclusion that defendant had some intention other than to commit rape, such as fondling or intercourse only if consent were forthcoming they did not provide sufficient basis for a finding that defendant intended to commit rape. The rule to be applied in assessing the evidence was stated as follows:

> Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all

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7/ Hammond v. United States, 75 U.S. App. D.C. 397, 127 F.2d 752 (1942); Baber v. United States, 116 U.S. App. D.C. 358, 324 F.2d 390 (1963); Allison v. United States, 133 U.S. App. D.C. 159, 409 F.2d 445 (1969).

> the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him.

Subsequently, in Curley v. United States, 81 U.S. App. D.C. 389, 160 F.2d 229 (1947) that rule was modified as follows:

> The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts. The task of the judge in such case is not easy, for the rule of reason is frequently difficult to apply, but we know of no way to avoid that difficulty.

To be valid, the first part of the above-quoted statement from the Hammond case, supra, must be understood to mean that the judge cannot let a case go to the jury unless there is evidence of some fact which to a reasonable mind fairly excludes the hypothesis of innocence. The statement refers to the requisite presence of evidence, and not to

> the absence or effect of other evidence. The second part of the quoted statement means that if, upon the whole of the evidence, a reasonable mind must be in balance as between guilt and innocence, a verdict of guilt cannot be sustained.

The question presented in this case is whether the District Court, applying the foregoing standards, properly denied defendant's motion for acquittal. The evidence before the District Court relevant to the question of intent consisted of the words "Come on, baby. Come on, baby" (Tr. 92), the observation of one witness that he saw a pair of men's feet with the toes pointing down at the place where the offense was alleged to have occurred (Tr. 93), the testimony of another witness that he saw Medley ". . . sort of on top of . . ." Edith Curry and that he saw Edith Curry's pants ". . . down about her knees like. . ." (Tr. 102-103),[8/] the observation of two witnesses that they saw Medley zipping his pants up (Tr. 93, 103). There is testimony of one witness that Edith Curry's "crotch area" was wet (Tr. 94) although it is unclear whether that testimony referred to her skin or her pants. Finally, there is the testimony as to her

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8/ At the time he made this observation he was accompanied by Witness New who did not testify that he had seen Miss Curry's pants down.

injured lip. There is no testimony of any kind from the alleged victim so the jury was limited strictly to what it might infer from the observations of Witness Jackson and Witness New in determining whether it was Medley's intention to commit rape.

While those observations might have supported a finding that Medley had some improper purpose they hardly establish beyond a reasonable doubt that his purpose was to commit rape. In Allison v. United States, 133 U.S. App. D.C. 159, 409 F.2d 445 (1969) this Court found that evidence substantially comparable to that which is present in this record, ". . . could not withstand a motion for judgment of acquittal as to assault with intent to commit carnal knowledge." There, in addition to testimony of the prosecutrix, which we do not have here, there was eyewitness testimony as to her screams and as to defendant being on top of her. Notwithstanding such evidence the court found that error had been committed in submitting the case to the jury.

More recently, in United States v. Bryant, ____ U.S. App. D.C. ____, 420 F.2d 1327 (1969) this Court observed that evidence of an indecent assault will not alone support a finding of intent to commit rape.

Assuming, arguendo, lack of consent, all that is present on this record is evidence of an indecent assault. It is evidence from which it might reasonably be concluded that Medley had something else in mind other than rape. There is no evidence of any fact ". . . which to a reasonable mind fairly excludes the hypothesis of innocence. . ." Curley v. United States, 81 U.S. App. D.C. 389, 160 F.2d 229 (1947) of the intent to commit rape. Thus under the standard promulgated in Curley defendant's motion for judgment of acquittal should have been granted.

b. The Government Failed To Establish Lack of Consent

At the time that Witness New and Witness Jackson came upon Medley and Edith Curry on September 17, 1968, they each heard sounds variously described as ". . . a moaning sound or a crying sound, whimpering sound. . ." (Tr. 92) by Mr. New and described as ". . . a girl crying . . ." (Tr. 102) by Mr. Jackson. Mr. Jackson, by the light of several matches, allegedly saw that Medley ". . . was sort of on top of her but she was fighting him off all the time" (Tr. 102-103). No one heard any screams. Although Miss Curry had a swollen and bleeding lip, no one saw how she was injured. There was no evidence that her clothing was torn. Miss Curry, of

course, did not testify as to how she happened to be in the basement with Medley or as to how her lip was injured. The only words overheard were "Come on,baby. Come on, baby" (Tr. 92). Although there was no testimony as to the inflection used in making that statement, a plain reading would seem to indicate a precatory rather than a threatening nature. In United States v. Bryant, ____ U.S. App. D.C. ____, 420 F.2d 1327 (1969) this Court made it clear that evidence of "violent familiarity", which is all that is present on this record, is not sufficient to establish the intent to use such force as may be necessary to overcome resistance.

Specifically, the Court observed that:

> A man who handles a lady vigorously and with some force (against her will) is plainly guilty of an assault -- of an indecent assault. But he does not have an intent to commit rape if his actions are taken in the hope or expectation of thereby awakening desire, and with the further intention of desisting if his approach does not arouse desire or lead to acquiescence but rather encounters continued resistance.
>
> When a defendant intends to use the kind of "force" that is enough in his mind to test the existence or persistence of complainant's true intentions, but not enough to achieve sexual intercourse if she "really" rejects him, there is no intent to commit rape.
>
> * * * * *

> Rulings on the issue under discussion appear in opinions of the state courts. They make it clear that the use of force or intent to use force is not enough for assault with intent to rape, if there is no intent to use force at the time of sexual intercourse.

There is nothing in this record to establish that the type of force which may have been used involved anything more than the type of "violent familiarity" which might be intended to "arouse desire" or "lead to acquiescence".

There remains a question as to the capacity of Miss Curry to consent.

Miss Curry was twenty-nine years old at the time of the trial and therefore, approximately twenty-seven years old at the time of the offense charged (Tr. 126). Her mother testified, however, that "She is a retarded child and she has a mind of a small child, around about seven years old probably" (Tr. 127). Also, the prosecution and the defense stipulated that ". . . Miss Edith Curry is retarded. That is a fact that you may assume for the purposes of your deliberations in this case" (Tr. 141-142).

The indictment made no reference to the age of the alleged victim as would have been done if the victim had been a minor. Nor did it make any reference to Miss Curry's mental condition. The offense as charged was,

therefore, one of assault upon an adult woman and lack of consent was as essential element to be proved by the prosecution.

The court gave no instruction on consent. It is reasonable to presume, therefore, that not only the trial court but the jury as well, equated mental retardation with inability to consent. Such as assumption of one of the most critical elements of this offense was improper.

We are aware of no case in the District of Columbia dealing with the mental capacity of a woman over the age of consent to give consent to carnal knowledge and thus eliminate one of the principal elements of the offenses of rape and assault with intent to commit rape. However, the question has been considered in other jurisdictions. See, for example, 75 C.J.S., Section 14, and cases cited therein in support of the following statement:

> Both at common law and under the provisions of some statutes, sexual intercourse with a woman mentally incapable of consent because of idiocy or imbecility or insanity is rape. Under these circumstances the question of consent is wholly immaterial, and neither actual force nor actual resistance is necessary or material to constitute the offense. The test of a female's lack of mental capacity to consent is that she must be so idiotic, imbecile, or insane as to be incapable of exercising any judgment in the matter or of knowing the nature of the act; her capacity to consent must be totally destroyed, although she need

> not be an absolute imbecile, but may be so far below the normal in mental strength as to be incapable of rational consent. However, a woman with a lower degree of intelligence than is requisite to make a contract may consent to copulation without rape being committed, and, if the female has sufficient intellect to know the nature of the act, and gives her consent, it is not rape (Footnotes omitted).

See also 44 Am. Jur., Rape, Section 10 stating that:

> The mere fact that female is weak-minded does not disable or disbar her from consenting to an act of sexual intercourse, and thereby preventing the act from being rape, for the victim may be capable of consent, as where the idiocy is not very profound or the mania severe (Footnotes omitted).

For a specific case involving circumstances closely comparable to those here presented see Hacker v. State, 73 Okla. Crim. 119, 118 P.2d 408 (1941) where a doctor testified that the mental age of a twenty six year old victim was about ten. The trial court held that this fixing of the mental age of the victim was sufficient basis for letting the case go to the jury on the question of capacity to consent. In reversing the conviction the appellate court stated that:

> The only circumstance offered by the state to show that prosecutrix was incapable of giving legal consent by reason of lunacy or unsoundness of mind is that she was

> considered to have the mentality of a child of ten or twelve. No opinion, either lay or expert, was expressed that she was incapable of legal consent, and no basis for such opinion was laid, with the exception of her low mental age.
>
> It is probable that the legislature in fixing the age of fourteen as the dividing line, had in mind not only the mental age of girls, but also their physical development. However, here, we have a twenty-six year old woman, fully developed and normal in all respects physically. . . .
>
> Following the holding of this court that the degree of intelligence necessary to give legal consent may exist with an impaired and feeble intellect, or it may not, it is necessary for the state to show more than mental age, which was not done in this case.

Here the jury was without evidence and, more importantly, without instructions from which it could properly have determined that Miss Curry is so mentally retarded as to have been incapable of consent to carnal knowledge other than the unqualified statement of her mother that she "probably" has the mind of a child of "around about" seven years old (Tr. 127). The jury had no opportunity to observe Miss Curry or her demeanor and no knowledge of whether Mrs. Curry's assessment of her daughter's mental capacity was based upon competent and current medical advice or upon mere conjecture. Thus, a key element of the offense charged was considered by the jury without evidence from which it could properly

have reached the conclusion that it obviously did.

V.

CONCLUSION

The record in this case requires that the judgment of conviction of the District Court be set aside. Such action is required by both procedural and substantive infirmities. Procedurally, appellant has been denied the right to a speedy trial without any proper justification. He has also been denied the right to counsel during the critical early stages of the prosecution. Substantively the record does not support the required findings of intent to commit rape or lack of consent.

Respectfully submitted,

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393-3390

Attorney for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served upon the United States Attorney for the District of Columbia this 22nd day of February 1971.

Peter A. Greene

[illegible] Appeals

United States Court of Appeals

for the District of Columbia Circuit

No. 22,912

United States of America, appellee

v.

Arthur E. Burney, appellant

Appeal from the United States District Court
for the District of Columbia

Edwin M. Stanley,
United States Attorney,

Joel A. Dana,
Edwin A. Williams,
Assistant United States Attorneys,

Frank L. Cleary,
Attorney, Department of Justice,

[illegible]

INDEX

TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether the trial court properly denied appellant's motion to dismiss the indictment on the ground that appellant had been denied a speedy trial?

II. Whether the trial court properly denied appellant's motion for judgment of acquittal?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,949

UNITED STATES OF AMERICA, APPELLEE

v.

ARTHUR S. MEDLEY, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a one-count indictment filed November 6, 1968, appellant was charged with assault with intent to commit rape (22 D.C. Code § 501). Trial was held on August 11 and 12, 1970, before the Honorable June Green, sitting with a jury, and appellant was found guilty as charged. On November 10, 1970, appellant was sentenced to imprisonment for three to ten years. This appeal followed.

The Offense

On September 17, 1968, appellant reported for work at the Trenton Terrace apartments, where he had been em-

ployed prior to a recent illness. On his way there he encountered Nathaniel Jackson, a fellow employee (Tr. 144). Jackson told appellant he had been fired for staying off the job so long, so appellant sought out Mrs. Snowden, the resident manager. She told him she did not know whether he had been fired or not (Tr. 145).

Appellant was next seen when Mr. Barty New, an insurance inspector, entered the Trenton Terrace apartments at 1100 Mississippi Avenue, S.E. (Tr. 91-92). Mr. New heard a "moaning sound or a crying sound, whimpering sound" from the basement washroom. He entered the room with a flashlight in his hand, saw a man's feet pointing downward, and heard someone saying, "Come on, baby; come on, baby." Mr. New then walked out of the room and encountered Nathaniel Jackson, the janitor (Tr. 92-93). Mr. New and Mr. Jackson returned to the basement, where they heard a girl crying. They observed appellant on top of Edith Curry, a mentally retarded young woman, who was trying to fight off appellant (Tr. 93, 102). Mr. Jackson lit a match and told appellant to get off the girl and get out. Edith, who was bleeding at the mouth from a swollen lip, pulled up her dungarees from her knees. Her crotch area was wet. Appellant arose, zipped up his pants and walked out, his shirt stained with blood (Tr. 94, 103). Mr. New and Mr. Jackson then helped Edith to her apartment (Tr. 93, 108). When Edith's mother, Mrs. Charity Curry, saw her, Edith was slobbering and crying. Her mouth was bleeding, swollen and twisted. Mrs. Curry then took Edith down to the street, where Edith identified appellant as the man who accosted her.[1]

The Trial

The offense was established at trial by several witnesses. Mr. New, the insurance inspector, and Mr. Jackson, the janitor, testified to appellant's presence in the basement

[1] Edith spontaneously told her mother that appellant had done a "nasty" to her, but the trial court refused to admit this statement into evidence (Tr. 129-131, 136-137).

on top of Edith Curry, his sexually encouraging statements, his unzipped pants and bloody shirt, Edith's distraught condition, her bloody lip and wet crotch, and her unbuttoned and lowered pants (Tr. 91-108). Detective Francis Baker testified that he responded to a call to D.C. General Hospital on a sex case, where he photographed Edith Curry and her mother (Tr. 120). Photographs of the laceration on Edith's lip, Government Exhibits Nos. 3 and 4, were admitted into evidence (Tr. 121, 137). Mrs. Snowden, the resident manager at Trenton Terrace, testified that appellant was at the apartments on September 17, and that following the incident Edith's hair was mussed up and her lip was swollen and bleeding (Tr. 124-125). Edith's mother, Mrs. Charity Curry, testified that Edith was twenty-nine years old but mentally retarded, with "the mind of a small child, around about seven years old probably," that she lost track of Edith for fifteen minutes before she returned home crying with a bleeding, swollen lip, and that Edith identified appellant in her presence (Tr. 126-133).

The prosecution and defense stipulated that if the examining physician at D.C. General Hospital were called, he would testify that he was unable to determine whether there was forced vaginal intercourse; that there was no evidence of semen in the vaginal area; that lip trauma consisted only of bruises and lacerations; and that Edith was mentally retarded (Tr. 141).

Appellant took the stand and admitted his presence in the basement of the Trenton Terrace apartments on September 17, 1968. His defense consisted of his uncorroborated assertion that Edith had accidentally hurt herself and that he was merely trying to assist her (Tr. 146-149).

ARGUMENT

I. There was no denial of appellant's right to a speedy trial.

A preliminary review of the chronology of proceedings in appellant's case from arrest to conviction reveals that the delay was of a different nature from that provided by appellant's description. The total elapsed time between arrest and trial was twenty-three months. Appellant was arrested in September 1968. A preliminary hearing, at which appellant was represented by counsel, was held in October 1968. The indictment was filed on November 6, and appellant was arraigned on November 11. Appellant pleaded not guilty before Chief Judge Curran, who referred appellant for appointment of counsel and permitted him to remain on bond (R. 2).[2] On May 16, 1969, a bench warrant was issued for appellant's arrest when he failed to appear at a hearing for ascertainment of counsel. Trial was first set for July 14, 1969, which was about ten months after appellant's arrest and eight months after indictment. Appellant failed to appear on July 14 for trial. On October 16, however, he was arrested on a new charge of larceny, and the bench warrant was executed (R. 4). Meanwhile, at a calendar call before Judge Green on October 1, 1969, appellant's case was referred to the Legal Aid Agency for appointment of counsel, notwithstanding that appellant was a fugitive (R. 5). It was not until December of 1969 that a representative of the Agency got around to interviewing appellant, although he had been incarcerated on other charges since October, or at least the record so suggests (R. 6).

Beginning in December 1969, a succession of pre-trial proceedings necessary to the extraordinarily competent and thorough defense appellant received was initiated. In December appellant was examined by a clinical psychologist at the request of the defense (R. 7). When the case

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[2] "R." refers to the numbered documents (other than the transcript) which are included in the record on appeal.

was called in February 1970, the defense successfully moved to have a psychiatrist interview appellant (R. 8-10). In May of 1970, some seven months after the case had been referred to the Legal Aid Agency, appellant's counsel, a Legal Aid attorney, filed a lengthy motion to dismiss the indictment on the dual grounds of lack of speedy trial and ineffective assistance of counsel (R. 11). Trial was then held three months later in August 1970, the motion having been denied.

"Briefly, the question whether there has been denial of the right to a speedy trial depends on the circumstances of the case, and requires consideration of the length of delay; reasons for the delay; diligence of prosecutor, court and defense counsel; and reasonable possibility of prejudice from the delay." *Hedgepeth* v. *United States* [*Hedgepeth II*], 125 U.S. App. D.C. 19, 21, 365 F.2d 952, 954 (1966); *see Hedgepeth* v. *United States* [*Hedgepeth I*], 124 U.S. App. D.C. 291, 294, 364 F.2d 684, 687 (1966). Applying these criteria to the facts of this case, we are compelled to conclude that appellant waited an unusually long time to be tried but that the delay was not wilful on the part of the prosecution, nor did appellant suffer any prejudice as a result of the delay.

This Court has held that there is no quantum of time the passing of which results automatically in a violation of the Sixth Amendment and dismissal of the indictment. *Hedgepeth I, supra.* The elapsed time in this case between arrest and trial was twenty-three months, a period not so lengthy of itself to require dismissal. The first calendar call of appellant's case, to arrange the appointment of counsel, took place in May of 1969, approximately six months after indictment. Considering that appellant was not incarcerated during this period, and that the District Court's heavy backlog at that time required that preference be given to cases where the defendant was in jail,[3]

[3] This Court has expressly approved such preferential consideration of jail cases. *Wilkins* v. *United States*, 129 U.S. App. D.C. 397, 395 F.2d 620 (1968); *Dockery* v. *United States*, 129 U.S. App. D.C. 243, 393 F.2d 352 (1968).

six months from indictment to calendar call was neither unusual nor prejudicial.

When appellant's whereabouts were finally determined at the October 1969 calendar call, appellant was furnished counsel [4] from the Legal Aid Agency. Then began a ten-month period, from October 1969 to August 1970, when trial finally took place, during which appellant took numerous steps necessary for adequate trial preparation. Had this ten-month period of pre-trial proceedings commenced in May of 1969, when the case was initially called, trial would not have been held until March of 1970. Thus the effective period of delay attributable to the uncertainty surrounding appellant's whereabouts was only five months.

The ten-month period between appointment of counsel and the beginning of trial must also be scrutinized. The appointment of counsel was first made in October of 1968, although appellant was not even interviewed by his undoubtedly busy trial counsel until December, two months later. Three to four months were taken up with having appellant examined by a succession of different psychologists, after which appellant filed a lengthy motion to dismiss on speedy trial grounds. After this motion was heard, the case proceeded expeditiously to trial.

This case, then, is not one in which the Government through lack of diligence proceeded lethargically to trial. Nor is it a case where the defendant never knew that charges were placed against him, such as *United States* v. *Reed*, 285 F. Supp. 738 (4th Cir. 1968), or where there was a delay of many years between arrest and trial, such as *Pitts* v. *North Carolina*, 395 F.2d 182 (4th Cir. 1968).

Appellant's statement at page 12 of his brief that none of the delay can be attributed to appellant is simply incorrect. As is true in many cases involving a lengthy delay between arrest and trial, the delay here may be fairly apportioned to several causative factors, including the

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[4] Appellant erroneously cites November 1969 as the date of appointment of counsel. The record shows that the date was October.

District Court's heavy backlog, administrative confusion surrounding appellant's whereabouts, and a period during which appellant explored several alternatives in preparing a defense. This Court's recent pronouncement in *Blunt* v. *United States*, 131 U.S. App. D.C. 306, 310, 404 F.2d 1283, 1287 (1968), *cert. denied*, 394 U.S. 909 (1969), is pertinent here: "[W]here a principal cause of postponement is the deliberate pace of the system of safeguards designed to protect the accused, the courts have been exceedingly reluctant to find constitutional infirmity even in very long delays." The facts in *Blunt* are similar to those in the instant case. Trial, which resulted in a mistrial, was not held until twenty-one months after arrest. Retrial came seven months later. Fifteen months were consumed by a series of mental examinations and hearings, all at the appellant's request. Despite the fact that at least three months of the delay in *Blunt* was attributable to Government-requested continuances and vacation periods, unlike the present case, the Court rejected the claim of denial of Blunt's right to a speedy trial and affirmed the conviction.

Hinton v. *United States*, 137 U.S. App. D.C. 388, 424 F.2d 876 (1969), is likewise in point. In *Hinton* there was a delay of fifteen months between arrest and trial, five months of which was due to a mistake on the Government's part in erroneously believing that Hinton was a fugitive when in fact he was incarcerated on other charges. This Court, in affirming the conviction, noted that "the delay here may have been the result of institutional inefficiency, a failure of communication between the different offices of government concerned with appellant." 137 U.S. App. D.C. at 393, 424 F.2d at 881. The delay in the instant case was the result of comparable institutional inefficiency and failure of communication. The Bail Agency, Bonabond and the Clerk's office were not in communication, and a similar five-month delay ensued.

This Court has in speedy trial cases also considered the "diligence *vel non* of prosecutor, court and defense counsel." *Hedgepeth I*, *supra*, 124 U.S. App. D.C. at 294, 364

F.2d at 687. In this respect we do not contend, as appellant implies at page 15 of his brief, that appellant's failure to demand a speedy trial justifies rejection of his claim, or that appellant forfeited his right by silence or inaction. Nor can it be said, on the other hand, that the delay was "arbitrary, purposeful, oppressive or veratious." *Smith* v. *United States*, 118 U.S. App. D.C. 38, 41, 331 F.2d 784, 787 (1964) (*en banc*). Although, ideally, appellant should have been brought to trial sooner, no single reason exists for the delay, and lack of diligence is neither admitted by appellee nor charged to appellant.

The last and most crucial factor to be considered in determining whether appellant's right to a speedy trial has been violated is the reasonable possibility of prejudice. With respect to this factor we maintain that appellant suffered neither the fact nor the possibility of prejudice.

Appellant contends he was prejudiced by the delay in two respects. He argues that there was no opportunity for anyone representing appellant to question the witnesses until fourteen months after the incident, and that the fourteen-month delay precluded him from obtaining any information from the mentally retarded victim. Notwithstanding appellant's contention, his appointed counsel at the preliminary hearing held in October of 1968, one month after appellant's arrest, no doubt had ample opportunity to interview all witnesses concerned with the case, including the victim. Why he apparently chose not to do so is unknown, although we note that appellant does not claim that he had ineffective assistance of counsel at the preliminary hearing.

Appellant's argument is essentially based on speculation. He states, for example, that "it *might have been* possible to elicit some utterance from the alleged victim . . . if only there had been an opportunity to question her promptly." (Brief for Appellant at 22.) As we have suggested, counsel representing appellant at the preliminary hearing could have conducted such an interview. For all anyone knows he may have done so. On the other hand, he may have concluded that because of her child-like men-

tality she would not have aided the defense in any way and thus determined not even to attempt to interview her. We engage in such conjecture merely to demonstrate that it is just as easy to speculate in favor of the prosecution as it is for the defense. Speculation about what might or might not have been is not enough to establish a violation of the Sixth Amendment. "[A] defendant seeking to vindicate his right to a speedy trial by showing prejudice cannot rely upon the mere possibility of dimmed memories and lost witnesses; instead, he must show some *concrete evidence of actual prejudice.*" Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 493 (1968) (emphasis added), citing *United States* v. *Ewell*, 383 U.S. 116, 122 (1966).[5]

In several cases decided by this Court far stronger and more meritorious claims of prejudice were advanced than have been advanced here, and yet the convictions were affirmed. For example, in *Blunt* v. *United States*, *supra*, the appellant presented alibi witnesses at a trial held twenty-eight months after his arrest. He claimed fatal prejudice in the deprivation of testimony of witnesses who could corroborate his alibi (one died, one fled the jurisdiction, and one suffered a lapse of memory). Still the conviction was affirmed, the Court also taking into consideration the strength of the Government's case and the convincing proof of Blunt's guilt.[6] In *Bynum* v. *United States*, 133 U.S. App. D.C. 4, 6, 408 F.2d 1207, 1209, *cert. denied* 394 U.S. 935 (1969), this Court noted that, despite the 537-day delay from arrest to trial, "perhaps the decisive consideration in this case is the lack of significant

[5] Even in the narcotics delay cases, this Court had held there must be at least a plausible claim of prejudice. *Jackson* v. *United States*, 122 U.S. App. D.C. 124, 351 F.2d 821 (1965); *Powell* v. *United States*, 122 U.S. App. D.C. 229, 352 F.2d 705 (1965); *Cannady* v. *United States*, 122 U.S. App. D.C. 120, 351 F.2d 817 (1965); *Mackey* v. *United States*, 122 U.S. App. D.C. 97, 351 F.2d 794 (1965).

[6] The present case is not dissimilar, in that the Government's case against appellant, including the testimony of two eye-witnesses, is extremely strong.

basis for a claim of prejudice to the defendant in the presentation of his case." *See also Hedgepeth II, supra.* Finally, this Court's comments in *Harling* v. *United States*, 130 U.S. App. D.C. 327, 330, 401 F.2d 392 (1968), are pertinent here:

> Although responsibility for the unjustifiable delays in this case cannot be laid to appellant, we affirm his conviction. It is settled that infringement of the right to a speedy trial depends upon several factors, including not only the length of the period between arrest and trial, the reasons for the delay, and the blameworthiness of the prosecution and the defense, but also the prejudice to the defendant. There may be cases where the length of the delay alone will be such as to establish prejudice as a matter of law, but we do not believe that point has been reached here. Even a slight showing of possible prejudice, inflamed by the fact of long and unjustified delay, might have entitled defendant to relief from continued jeopardy. On the facts of this case, however, we fail to detect even a wisp of prejudice. For most of the period of delay, appellant remained free on bail. Appellant has not made any claim that his defense at trial was in any way impaired by the delay. No proof was lost and the Government's case was exceptionally strong. Under these circumstances, there is no call for reversal in the interest of justice, and the conviction is affirmed.

Affirmance is likewise in order here.[7]

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[7] Despite the fact that appellant had the extremely capable and thorough assistance of counsel at every critical stage of the proceeding, including many months of exhaustive pre-trial preparation, appellant argues further that the absence of counsel in an interim period before trial necessitates reversal. Where an accused has effective assistance of counsel at his preliminary hearing, and the assistance of assigned counsel for a period of months before trial. no valid claim of deprivation of the Sixth Amendment right to counsel may be made. Appellant's failure to cite a single case in support of his contention reveals its frailty. Here again he bases his argument on speculation as to what counsel might have done, and here again such speculation is not eough to sustain him. "Claims of reversal premised on the absence of a lawyer at that

II. The evidence was sufficient to prove all the elements of the offense charged.

(Tr. 90-174, 213-214)

Appellant argues that the evidence did not establish intent to commit rape (*i.e.*, intent to commit "carnal knowledge of a female forcibly and against her will," 22 D.C. Code § 2801). We maintain, to the contrary, that the evidence was quite strong as to every element. Indeed, the only testimony *not* offered was that establishing actual penetration, which of course is unnecessary when the charge is mere assault with intent and not the completed act of rape.

Put simply, appellant was caught in the act. Two eyewitnesses, rare in a sex case, testified consistently and straightforwardly to the noises being made by the victim while attacked (Tr. 92, 102), the position of appellant on top of the victim with his feet pointing downward (Tr. 92, 102), appellant's sexually-stimulating utterings (Tr. 92), appellant's and the victim's state of partial undress (Tr. 93-94, 103), the victim's efforts to resist appellant (Tr. 102-103),[8] the victim's disheveled condition following the attack, including a bloody lip (Tr. 94-103), and the wetness in the victim's crotch area (Tr. 94). The jury chose to disbelieve appellant's lame defense that he was merely helping up the victim from a fall. No doubt the jury was swayed by the inconsistency between appellant's testimony and that of witness New, who testified that appellant was still with the victim after he returned from finding Mr. Jackson, the janitor (Tr. 93).

The cases in point, including those cited by appellant, are consistent with the Government's position that there

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stage [between arraignment and trial] must demonstrate prejudice." *Long* v. *United States*, 124 U.S. App. D.C. 14, 20, 360 F.2d 829, 835 (1966); *cf. McGill* v. *United States*, 121 U.S. App. D.C. 179, 348 F.2d 791 (1965).

[8] Mention of this testimony is conveniently omitted by appellant in his summary of evidence available to the jury on the question of intent (Brief for Appellant at 31-32).

was more than sufficient evidence of intent to go to the jury and establish guilt. Dictum in *United States* v. *Bryant*, 137 U.S. App. D.C. 124, 420 F.2d 1327 (1969), quoted by appellant, has no relevant nexus with the facts of this case. In *Bryant* evidence which established an intent to commit rape consisted solely of testimony of the victim, who was alone in her apartment with Bryant at the time of the attack. Her testimony was corroborated by bruises on her face and a torn shoulder strap on her dress. Bryant, who was not even apprehended in the victim's presence, much less on top of her as was appellant here, gave an account of the incident which, although remotely possible, was disbelieved by the jury. Similarly, the facts in the recent case of *United States* v. *Huff*, D.C. Cir. No. 22,793, decided March 8, 1971, which supported a conviction for assault with intent to rape, were considerably fewer and weaker than those in the case at bar. In *Huff* the victim's own testimony was corroborated only by her physical injuries consisting of bruises, her testimony about the strange apartment where the attack occurred, and the testimony of a neighbor who testified that the victim's clothes were in a state of disarray. *See also United States* v. *Terry*, 137 U.S. App. D.C. 267, 422 F.2d 704 (1970).

Appellant's reliance on *Allison* v. *United States*, 133 U.S. App. D.C. 159, 409 F.2d 445 (1969), is misplaced. The Court in *Allison* was concerned not with the sufficiency of the evidence establishing intent to commit carnal knowledge but with the sufficiency of the *corroborating* evidence over and above the testimony of the prosecutrix:

> [W]e have no doubt that the Government's case established an intent to commit carnal knowledge. According to the testimony of the prosecutrix, appellant grabbed her, attempted to kiss her, threw her on a couch upon which he had placed a white shirt, threatened to harm her if she screamed, exposed himself, got on top of her, and attempted to remove her pants. *If this testimony were corroborated* it would surely

> support a jury finding that, beyond a reasonable doubt, appellant entertained the intention to carnally know the prosecutrix. 133 U.S. App. D.C. at 163-164, 409 F.2d at 449-450.[9]

The corroboration that was lacking in the *Allison* case was provided here by the two eyewitnesses.

Appellant argues further that the trial court erred in failing to instruct the jury on the issue of consent, *i.e.*, whether the victim consented to appellant's acts. We maintain that the trial court properly gave all necessary instructions for a case of assault with intent to commit rape, and that the instructions given were identical to the instruction recently suggested by this Court in *United States* v. *Bryant*, *supra*, 137 U.S. App. D.C. at 133, 420 F.2d at 1336.[10] This instruction stated, in pertinent part, "that he intended to achieve penetration of the complainant's sexual organs against her will and by using such force as might be necessary to overcome resistance or make further resistance possible" (Tr. 213-214).

"Consent," or the absence thereof, is obviously embodied within this instruction, which speaks of intended penetration "against her will" and such force as is necessary "to overcome resistance." The evidence of such force was abundant: the victim was observed to be "fighting off" appellant "all the time" (Tr. 102-103); the victim was distraught and crying after the attack (Tr. 94-103); and the victim sustained a bloody lip (Tr. 94-103). Thus, inasmuch as the trial court's instructions comported with this Court's recent decision in *Bryant*, and the issue of consent was clearly presented to the jury in the instructions as given, appellant may not now be heard to argue

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[9] The Court also made clear in *Allison* that in order to withstand a motion for judgment of acquittal of the charge of assault with intent to commit carnal knowledge, the evidence need not exclude every reasonable hypothesis other than intent to have intercourse. 133 U.S. App. D.C. at 164 n.16, 409 F.2d at 450 n.16.

[10] We note that the trial court gave the defense all its requested instructions.

that the jury was improperly instructed with respect to consent.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24949

(Criminal No. 1785-68)

ARTHUR S. MEDLEY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal From A Judgment Of The
United States District Court
For the District of Columbia

REPLY BRIEF OF APPELLANT

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Due Date: May 6, 1971

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REPLY BRIEF OF APPELLANT

I.

By its brief filed with the Court on February 22, 1971, appellant has requested that the judgment below be set aside.

The grounds for such request as set forth more fully in appellant's opening brief are:

1. Appellant was denied a speedy trial in violation of the Sixth Amendment;

2. Appellant was denied timely assistance of counsel in violation of the Sixth Amendment; and;

3. The Government did not present sufficient evidence to support a conviction of the offense charged.

The Government by its late-filed brief received by the Court on April 22 contends that all of the foregoing grounds are without merit. Because the Government's argument is premised to some extent upon misstatements of the record, appellant feels constrained to file this reply brief for the purpose of clarifying those misstatements. Limited response to certain aspects of the Government's substantive arguments are also included.

II.

RESPONSE TO FACTUAL MISSTATEMENTS

At page 2 of its brief[1/] the Government states that:

1/ Page references are to the typewritten draft of the Government's brief which is the only copy received by appellant at the time of preparation of this reply brief.

> They observed appellant on top of Edith Curry, a mentally retarded young woman, who was trying to fight off appellant (Tr. 93, 102).

The foregoing statement indicates that more than one witness made the observation referred to. Actually only Mr. Jackson, defendant's long-time acquaintance and co-worker who by his own admission was pre-disposed to assuming defendant guilty of wrong doing (Tr. 110), testified to having seen defendant ". . . sort of on top of. . ." Miss Curry (Tr. 102) or to having observed Miss Curry ". . . fighting him off all of the time" (Tr. 102-3). The other witness to whom the Government improperly ascribes such testimony is Mr. New, an insurance inspector who was present with Mr. Jackson at the time Jr. Jackson alledgedly saw defendant on top of Miss Curry and Miss Curry fighting him off. Mr. New did not testify to any such observations. The Government refers to transcript page 93 of Mr. New's testimony in support of the above quoted assertion. That testimony indicates, however, that although Mr. New was with Mr. Jackson at the time he observed defendant with Miss Curry Mr. New did not testify that he either observed defendant on top of Miss Curry or saw Miss Curry fighting defendant off. The balance of Mr. New's

testimony is similarly devoid of any reference to such observations.

On page 3 of its brief the Government again attempts to ascribe to Mr. New testimony which he never presented. The Government states that:

> Mr. New, the insurance inspector, and Mr. Jackson, the janitor, testified to appellant's presence in the basement on top of Edith Curry, . . . Edith's distraught condition . . . (Tr. 91-108).

Mr. New never testified to seeing defendant on top of Edith Curry or to her "distraught" condition although, as already noted, he was present at the time that Mr. Jackson allegedly made such observations.

Again on page 13 of its brief the Government alleges that:

> Two eye witnesses . . . testified consistently and straight forwardly. . . to . . . the position of appellant on top of the victim . . . the victim's efforts to resist appellant. . ."

Again, only one of the eye witnesses testified to the above quoted observations.

On page 2 of its brief the Government also states that:

> Mrs. Curry took Edith down to the street, where Edith identified appellant as the man who accosted her. 2/

The Government's footnote refers to several pages of argument over material which the court held to be inadmissable. The admissable testimony on the pages referred to indicate nothing more than the fact that Miss Curry pointed to defendant immediately after the incident which has given rise to this prosecution (Tr. 136). There is no indication as to whether Miss Curry was identifying Medley as the man who helped her up after she fell, the man with whom she was voluntarily engaging in some sort of sexually oriented activity, or the man who, as the Government contends, had "accosted" her.

The Government's brief is also somewhat misleading as to the chronology of events during the twenty three months that elapsed between appellant's arrest and trial. At pages 4 and 6 of its brief the Government asserts that appellant was ". . . furnished counsel. . ." in October rather than November, 1969. The record indicates that the case was first referred to Legal Aid for assignment of counsel by Judge Green on October 21, 1969, rather than October 1, 1969, as alleged by the Government. That assignment was apparently ineffective since the case was again referred to Legal Aid by Judge Green on October 31, 1969. In any case, trial counsel stated that he ". . . never received notification of it [the referral] until about the middle of November at which time I immediately came down and consulted the court file" (Tr. 56).

III.

RESPONSE TO SUBSTANTIVE ARGUMENTS

A. Denial of Speedy Trial

In response to appellant's assertion of his denial of a speedy trial the Government concedes at page 5 of its brief that ". . . appellant waited an unusually long time to be tried. . ." but argues that ". . . the delay was not willful on the part of the prosecution, nor did appellant suffer any prejudice as a result of the delay."

Turning first to a discussion of the elapsed time of twenty-three months, the Government gratuitously observes that "the elapsed time in the case between arrest and trial was twenty-three months, a period not so lengthy of itself to require dismissal" (p. 5). Such an observation runs directly contrary to the holding of this court in Harling v. United States, 130 U.S. App. D.C. 392, 401 F.2d 393 (1968) ". . . that periods of delay from arrest to trial which exceed a year raise a claim with 'prima facie merit'".

In examining the ". . . unusually long time. . ." between defendant's arrest and trial the Government concludes on page 6 of its brief that the net delay to be considered in assessing the prejudice suffered by defendant is five months. Appellant is unable to comprehend the underlying rationale of such a conclusion. In response, appellant would merely submit

that the incorrectness of the Government's assertion is clearly evident from the fact that defendant was arrested in September 1968 and his defense counsel was first notified of his appointment to defend Medley in mid-November 1969 (Tr. 56). During the intervening period of fourteen months defendant did nothing to contribute to such delay (Tr. 25-27, 29-30, 44-45). Thus, even if it were improperly assumed that the entire period from mid-November 1969 to August 1970 were to be improperly attributable to dilatory maneuvering on the part of appellant rather than to a combination of legitimate trial preparation and the ". . . deliberate pace of the system . . ." as was actually the case, the preceding delay of fourteen months would more than satisfy the standard of prima facie merit established in Harling, supra.

The Government next denies lack of diligence on its part as the reason for the inordinate delay between arrest and trial. In response to that contention appellant would merely refer the Court to the facts of record and submit that it should not be appellant's responsibility to establish that the excessive delay to which he has been subjected was unjustified; rather it should be the Government's burden to establish that it was justified. Such a burden flows naturally from the fact that

it is the prosecutor, and not the defendant, who controls the calendar.[2/]

The Government next asserts ". . . that appellant sufferened neither the fact nor the possibility of prejudice" (p. 9).

As indicated in its opening brief, appellant is unwilling to concede that it must, under the circumstances of this case, affirmatively establish prejudice but would rely instead upon the proposition that ". . . the very assumption of the Sixth Amendment is that unreasonable delays are by their nature prejudicial. . ." and that ". . . it is not generally necessary for the defendant to demonstrate affirmatively how he has been prejudiced by an unreasonable delay." Hedgepeth v. United States, 124 U.S. App. D.C. 29, 364 F.2d 684 (1966).[3/]

The Government contends, however,relying primarily upon the views expressed by an unidentified commentator in a law journal article as its authority, that Medley must affirmatively establish "some concrete evidence of actual

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2/ Bynum v. United States, 133 U.S. App. D.C. 4, 408 F.2d 1207 (1969), cert. denied, 394 U.S. 935, 89 S.Ct. 1211.

3/ See also United States v. Lustman, 258 F.2d 475 (1958) holding that ". . . a showing of prejudice is not require when a criminal defendant is asserting a right under the Sixth Amendment and concurring opinion of justice Brennan is Dickey v. Florida, 398 U.S. 30, 26 L.Ed.2d 26 (1970) observing that: "When the Sixth Amendment right to a speedy trial is at stake, it may be equally realistic and necessary to assume prejudice once the accused shows that he was denied a rapid prosecution."

prejudice" as a condition to his entitlement to his right to a speedy trial (p. 10). It further contends that Medley can show no "concrete evidence of actual prejudice" from the delay to which he was subjected because counsel was appointed to represent him at his preliminary hearing who could have interviewed prosecution witnesses while events were still fresh in their minds. In fact, the Government speculates that "for all anyone knows he may have done so. . ." (p. 9-10).

This Court has recently had occasion in Coleman v. United States, _____ U.S. App. D.C. _____, _____ F.2d _____ (No. 22, 129 decided March 8, 1971) to acknowledge the "shortcomings" of representation by counsel appointed for the purpose of representing an accused person at preliminary hearing. The Court there noted, in response to appellant's assertion that he was not represented by counsel subsequent to his preliminary hearing, that "our experience with the practical functioning of the Criminal Justice Act in respect of initial presentments in General Sessions Court makes such lack of counsel not unlikely." (Slip decision at sheets 13-14). Here the record is clear that counsel appearing with Medley at his preliminary hearing did nothing more in connection with this case (Tr. 39-40). Specifically, he did not interview either the victim or any of the prosecution witnesses other than the police officer who testified at the preliminary hearing (Tr. 40).

Thus, appellant was quite clearly not represented by counsel at any time between his preliminary hearing on October 2, 1968, and mid-November 1969 when trial counsel first received notice of his appointment. If, as the Government contends, appellant must show "concrete evidence" of how he was prejudiced by such delay, such "concrete evidence" is clearly embodied in the following statements of trial counsel (Tr. 56):

> I never received notification of it until about the middle of November at which time I immediately came down and consulted the court file.
>
> At that time I immediately went out and talked to the witnesses whom I could locate and that was the complaining witness and her mother and a Mr. Jackson, who is one of the witnesses in the case.
>
> The complaining witness has no recollection at all of what happened then and I could learn nothing from her, the thing having occurred a long time ago.
>
> There was some recollection by Mr. Jackson of what occurred but Mr. Jackson, of course, does have a history of drunkenness, etc., but he was able to relate what he recalled.
>
> Another witness whose name I learned of from the affidavit, a Barty New, Mr. Barty New, I was unable to locate Mr. New and this morning for the first time I received a new address from Mr. Williams.
>
> Mr. New was an eye witness on the scene.

B. Denial of Timely Assistance of Counsel

The Government has chosen to respond to appellant's assertion of denial of timely assistance of counsel in a footnote at page 12 of its brief in which it cites cases for the proposition that "claims of reversal premised on the absence of a lawyer at that stage [between arraignment and trial] must demonstrate prejudice." Appellant submits that such prejudice has clearly been established by the above quoted statements of trial counsel.

C. Insufficiency of Evidence To Support The Conviction

In his opening brief appellant asserted that the Government had failed to present sufficient evidence of either the intent to commit carnal knowledge or the lack of consent. With respect to the question of whether intent was established the Government has merely argued its evaluation of the evidence as opposed to appellant's. No useful purpose would be served by further argument on this point and appellant merely submits that his evaluation as set forth in his opening brief is the proper one.

With respect to the question of insufficiency of evidence to clearly establish lack of consent the Government has failed to come to grips with the underlying basis of appellant's contention. The Government takes the position that the trial court gave all of the instruction suggested by this court in United States v. Bryant, 137 U.S. App. D.C. 124, 420 F.2d 1327 (1969) and that such instructions were all that were necessary to insure proper evaluation by the jury of the evidence presented to it in this case. In Bryant there was no question as to the alleged victim's capacity to consent. Here there was. Both by testimony (Tr. 10) and by stipulation (Tr. 141-142) the jury was advised that Miss Curry was mentally retarded. It would be unreasonable to presume that the jury did not take such evidence into consideration in determining whether or not Miss Curry had validly consented to what Mr. Medley is alleged to have intended. Certainly, in the absence of some instruction to the contrary there is no reason why the jury would not have considered such evidence. Yet as demonstrated in appellant's opening brief, such evidence was manifestly inadequate to properly establish lack of capacity to consent and thus eliminate the need to establish one of the principal elements of the offense with which appellant has been charged. Under

such circumstances the failure of the Court to go beyond Bryant instructions constituted plain error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this reply brief was served upon the United States Attorney for the District of Columbia, this 4th day of May, 1971.

Peter A. Greene